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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 719

ALL STATES FREIGHT, INC., ET AL., *Appellants*

v.

THE NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY, (Richard Joyce Smith, William J. Kirk, and Henry W. Dorigan, Trustees) ET AL., *Appellees*

On Appeal from the United States District Court for the District of Connecticut

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM AND RESPONSE TO MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES

STATEMENT

Appellant All States Freight, Inc., and the other appellants named in Appendix A hereto, oppose the Motion to Affirm, without further hearing, the judgment of the court below.

While the nature of the case is for the most part adequately presented in the statements thereof appearing in the Jurisdictional Statement and the Motion to Affirm there is an erroneous statement of fact at pages 2 and 3 of the Motion to Affirm which requires correction. There, appellees, by reference to the decision of the court below, indicate that the New York, New Haven, and Hartford Railroad Company initiated the rates in issue in part to meet competitive trailer-on-flatcar services of other railroads which *service the New Haven was not in a position to handle extensively because of equipment and clearance difficulties.* Further, appellees state that the New Haven was required to establish the rates in issue because "it had no funds to provide [trailer-on-flatcar service] on a fully competitive scale." Although evidence respecting physical disabilities on the part of the New Haven in performing trailer-on-flatcar service was introduced at the hearing before the Commission the record also includes evidence that those disabilities were removed by September of 1959 and further contains testimony by a witness for the New Haven that thereafter it was able to render trailer-on-flatcar service comparable to and competitive with that of other railroads.

In appellants' view of the case the foregoing factual matters are of no real significance, but because the court below based its decision on the competitive position of the New Haven Railroad rather than upon a testing of the Commission's decision against settled principles of judicial review and the provisions of the statute which the Commission is required to administer and enforce, it is imperative that there be no misunderstanding as to these factual matters.

In view of the memorandum submitted jointly by the Interstate Commerce Commission and the United

States there is, for purposes of this appeal, one other fact which has not heretofore been emphasized that should be noted. The court below in reaching its decision did not remand the case to the Commission. Rather, its judgment annulled and set aside the decision of the Commission to the extent that it found the rates in issue to be unlawful and permanently enjoined the United States or the Commission from enforcing that decision (13a-14a).[1]

ARGUMENT IN OPPOSITION TO MOTION TO AFFIRM

Appellees' arguments in support of their Motion to Affirm are directed to the proposition that the questions presented by this appeal are not sufficiently important to warrant plenary consideration by this Court. But the motion itself suggests the necessity for consideration and disposition of the issues by this Court, for if the court below was correct in its construction of Section 1(6) of the Interstate Commerce Act the Commission will be powerless to pursue the goals of regulation set forth in the National Transportation Policy[2] in that it will be unable to control minimum rates and thereby to protect the financial integrity of the transportation system.

Section 1(6) of the Act requires carriers to establish, maintain, and enforce just and reasonable classifications of property and further requires that rates for the transportation of property be made with reference to such classifications. The obvious significance of the requirement is that all rates must bear a reasonable and proper relationship to each other, and the

[1] All page references herein are to the Jurisdictional Statement unless otherwise indicated.

[2] 49 U.S.C. preceding §§ 1, 301, 901, and 1001.

Commission in the evaluation of any particular rate proposal not only may but must consider the impact of that proposal upon the total rate structure of the carriers. The serious error of the court below lies in its determination that the Commission may not disapprove a rate proposal on the ground of violation of just and reasonable classifications in that it is improperly related to the lawfully established and existing rate structure. While it is correct, as noted by the court below, that the requirement of just and reasonable classifications protects shippers from unduly high transportation charges by preventing a defeat of the Commission's maximum rate power, the court erred in failing to recognize that the requirement also necessarily protects carriers from unduly low transportation charges through a concomitant protection of the Commission's minimum rate power.

I

The first argument advanced by appellees is that the decision below does not constitute a new interpretation of the Interstate Commerce Act but rests simply on the historical meaning of that section. The court's interpretation of Section 1(6) reads (9a-10a):

> "The just and reasonable classification requirement of § 1(6) was adopted in 1910 to give the Commission power to control classification, there being some doubt as to the existence of the power, and its purpose was to protect shippers by controlling the maximum charges for transportation of commodities. This purpose is fulfilled by the maintenance in being of class rates even though competitive conditions lead to the furnishing of service through variously constructed rates at lower charges. The practice of the Commission over the past 21 years, as pointed out by Commis-

> sioner Webb in his dissent in the instant case, was consistent with this interpretation, permitting competitively compelled departures from the classification in e.g. All Freight to Pacific Coast, 248 I.C.C. 73, aff. Pacific Inland Tariff Bureau v. United States, 50 F. Supp. 376 (W.D. Wash. 1943), and cases cited, supra, [sic] We can see no difference in principle between those cases and the one before us and no sound reason for so interpreting § 1(6) as to prohibit such competitively compelled departures from classifications, within the established maxima, absent some other violation of the Act than the mere departure from the classification."

From the foregoing it is perfectly plain that the court held section 1(6) to be significant only in a maximum rate case. That is to say, the court viewed the section as having been enacted to prevent a defeat of the maximum rate power, conferred upon the Commission in 1906,[3] through an increase in classifications rather than rates.

The critical importance of the issue presented to this Court is well demonstrated by the statement of the court below in rejecting the Commission's interpretation of Section 1(6). That statement, which appears in the paragraph of the opinion immediately following the paragraph previously quoted, reads (10a-11a):

> "The Commission fears that approval of these rates would be legislation on its part, apparently because it would be the final blow to classification as a control over minimum rates and a further weakening of its role as a 'giant handicapper.' Having permitted over a long period exceptional

[3] The Hepburn Act, June 27, 1906, 34 Stat. 589, 49 U.S.C. § 15.

> rates which actually move the vast preponderance of this traffic at rates below the class rates, it would seem that it has already effectually legislated or interpreted the modification of what it now claims was the original meaning and purpose § 1(6). It is strange to find it boggling at this final step of so little effect on traffic actually moving under class rates.[4] In any case, we do not agree that these rates are or ever were a violation of the language or intent of section 1(6). Commodity rates are sufficiently policed under sections 1(5); 2; 3(1); and 15a(3). The record discloses no violation of these sections. It would appear that the Commission here invokes § 1(6) as a means of preserving a basis for the 'value of service' concept in ratemaking referred to above, in a desire to hold fast to a past which has already slipped away beyond our reach."

As the court below noted, the Commission viewed the requirement of just and reasonable classifications for ratemaking purposes as also protecting its minimum rate power.[5] Obviously, just as an increase in classification could be used to defeat the maximum rate power so it is manifest that a decrease in classification could be used to defeat the minimum rate power. And if it may so be used, as the court below would hold, the Commission's regulatory task will be impossible of performance. Of the utmost significance in this context is the fact that the minimum rate

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[4] While the court had noted that only about one percent of rail carload traffic in the East moved on class rates (7a), the Commission had found that the rates in issue represent the highest level at which *the bulk* of the New Haven's westbound traffic would move (17a), and had concluded that the rates were destructive of the rate structure generally, not just of class rates. (22a).

[5] 49 U.S.C. § 15(1).

power was given to the Commission in 1920 by amendment of Section 15(1)[6] which also confers the maximum rate power and which specifically embraces within its terms the power to determine and prescribe just, fair, and reasonable individual or joint classifications.

The Commission in its decision very carefully noted and explained that the term "classification" as used in Section 1(6) was broader than the specific classification used by carriers in the establishment of class rates and that the Act required *all* rates to be made with reference to just and reasonable classifications. It further noted that this Court in *Ann Arbor R. Co.* v. *United States,* 281 U.S. 658 (1930) had confirmed the duty of the Commission to regulate the justness and reasonableness of the relationship of rates for the various classes of traffic and the various classes and kinds of commodities. This Court's decision in that case was based upon the *Hoch-Smith Resolution,* 49 U.S.C. Section 55, which is still in effect (21a-23a).

It will be observed that the Court below in setting forth its version of the historical meaning of Section 1(6) refers to numerous decisions to show that the practice of the Commission over the past 21 years has been consistent with the court's "maximum rate" doctrine (9a). However, reference to the Commission's report will disclose that it referred to many of those same decisions and pointed out that they differed from the instant case in that there the rates at issue did not constitute departures from the just and reasonable classifications required by Section 1(6) either because they reflected an average classification or because they were higher than the rates which would otherwise

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[6] Transportation Act of 1920, 41 Stat. 484, 49 U.S.C. § 15.

apply and thereby were not destructive of those rates (20a-21a). Thus the court below misinterpreted the specific significance of Commission decisions issued in a field of its particular competence.

Plainly the requirement of Section 1(6) that *all* rates, class or commodity, meet the test of reasonable classifications was and is intended to protect both the maximum and minimum rate powers of the Commission. Certainly, if Congress had intended otherwise it would have so provided at the time it conferred the minimum rate power on the Commission in 1920, some ten years after having established the requirement that carriers maintain just and reasonable classifications for ratemaking purposes.[7] It follows, therefore, that the publication of a rate which for all practical purposes lumps both straight and mixed shipments and virtually any kind of commodity for the purpose of determining transportation charges necessarily violates the basic requirement of Section 1(6) that just and reasonable classifications *shall* be maintained for purposes of ratemaking.

The Court below has declared that the rates in issue may not be condemned under Section 1(6) of the Act even though they constitute a departure from just and reasonable classifications (9a). Thus is achieved a judicial modification of the words of the statute in plain derogation of the rule that a court must construe what Congress has written and cannot add to, subtract from, delete, or distort the words used.[8] Similarly it is not within the judicial function to rewrite a statute so that it will authorize what the court thinks

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[7] Mann-Elkins Act, June 18, 1910, 36 Stat. 544, 49 U.S.C. § 1(6).

[8] *62 Cases of Jam* v. *United States,* 340 U.S. 593 (1951).

should be authorized.[9] The court rationalizes its departure from principle and its modification of the law as enacted by Congress by adverting to economic conditions which have changed since the law was enacted. These changed conditions were also recognized by the Commission which soundly noted that it was the province of Congress and not the Commission to make any necessary changes in the law (23a-24a).

The sharp importance of the issue presented by the decision of the court below is clearly demonstrated in the contrast between it and the decision of the three-judge court in *Pennsylvania Truck Lines, Inc.* v. *United States,* 219 F. Supp. 871, 875 (W.D., Pa. 1963) where, in sustaining a decision of the Interstate Commerce Commission the Court said:

> "While there may be some merit to the plaintiff's contention that changed conditions in the transportation industry since the enactment of the Interstate Commerce Act require a reassessment of the National Transportation Policy with respect to railroads, this Court should not become the vehicle for reshaping the laws which Congress has written. The plaintiff's appeal in that regard must be to Congress itself. The complaint must be dismissed."

II

The second argument in support of the motion is closely akin to the first and is a contention that the court below did not hold that the meaning of the Interstate Commerce Act should be modified in light of changed economic circumstances and that the Court's

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[9] *Story* v. *Snyder,* 184 F. 2nd 454 (D.C. Cir., 1950).

interpretation of Section 1(6) simply accords with the original meaning of that section. In point of fact, however, the Court indulged in a lengthy dissertation as to the development of class rates, commodity rates, and all-commodity rates (6a-9a). In the course thereof the court enumerated factors considered in the classification of commodities for transportation, including value of service, and stated that the semi-monoply position of the railroads allowed them to observe these factors, particularly value of service, well into this century (6a). The court concluded that departures from, i.e. violations of, just and reasonable classifications when competitively compelled do not violate the Act. In effect the court held, without support in the Act or decisional precedent, that the existence of competition justifies complete disregard of the requirements of Section 1(6). This is the new interpretation which makes it tremendously important for this Court to hear and determine the issues presented.

As already noted, the court below cited a number of Commission decisions in which all-commodity rates had been approved and then said that it could see no difference in principle between those cases and the decision of the Commission under review (9a). However, the decision of the Commission clearly recognized *the distinction in principle* between those cases and the one at bar by pointing out that all-commodity rates heretofore approved have generally applied on a limited number of commodities and required the mixing of two or more commodities in order to reflect the average carload rate for the commodities covered, thereby adhering to rather than departing from classification principles (20a). The Commission further observed that in those few cases where all-commodity

rates not limited to mixed shipments were approved, the rates were at the same level or higher than the carload commodity rates and thereby did not represent departures from the classifications required by Section 1(6) of the Act. Further, the Commission noted that where all-commodity rates applicable on straight shipments would constitute departures from classification as required by the Act they have been condemned (21a). Thereafter the Commission discussed the rates here in issue, having already recognized that they range from 45 to 19 per cent of first class and constitute the highest level at which the bulk of the New Haven's westbound traffic would move, noted that thousands of commodities are included in the adjustment without relation to classification principles and concluded that the rate proposal thereby violates Section 1(6) (22a).

The court, without referring to the foregoing specific findings and conclusions of the Commission, said that the Commission appears to invoke Section 1(6) "as a means of preserving a basis for the 'value of service' concept in ratemaking * * * in a desire to hold fast to a past which has already slipped away beyond our reach." (11a) The plain significane of the decision is that the requirement that rates be made with reference to just and reasonable classifications of property can no longer be an operative standard of ratemaking because the legislation was enacted at a time when the railroads "were powerful monopolies." (11a) It would be serious enough if the court below had held that the Commission misapplied the factors and criteria which go into just and reasonable classifications for it would thereby have substituted its judgment for that of the administrative agency in a field where the

agency is vested with broad discretion.[10] It is even more serious where the court holds that the Commission may not apply the standards of Section 1(6) to rates applying on virtually any commodities in straight shipments, with only very limited exception, which the

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[10] *Alabama Great S.R. Co.* v. *United States*, 340 U.S. 216 (1951); *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 592-593 (1949); and *United States* v. *I.C.C.*, 221 F. Supp. 584, 586-587 (D.C., 1963) where the court said:

> "The fixing of railroad freight rates is a complex and intricate undertaking requiring expert knowledge and skill. It differs from the determination of rates to be charged by public utilities of other types. Most public utilities, other than those in the transportation field, deal in a single commodity or service, such as gas, electric power, telephone service, and the like. In such cases, it is necessary to calculate what income is likely to be received by the utility if the rate is fixed at a specific amount, and ascertain whether the expected earnings would result in a fair return. In the case of transportation facilities, however, rates must be established on hundreds, or possibly thousands, of different commodities. *The question then becomes, in part, whether the entire rate structure comprising the sum total of the income to be realized from all shipments of these many types, will result in a fair return to the carrier.* No one freight rate may be considered individually. The entire group with its innumerable ramifications must be evaluated as a whole, like a piece of tapestry composed of thousands of individual threads of various colors and hues. It is a resultant of many elements. Economic effects of particular rates on communities which they affect, and on lines of business to which they relate; the extent to which they are likely to attract shipments to transportation facilities of a specific type or draw it to competitors; the amount of charges that the traffic will bear and numerous other factors must all be weighed in determining the reasonableness of freight rates. The task comprehends much more than mathematical computations. The outcome depends on sound judgment and keen discernment based on an appraisal of the various considerations and their interrelation. Obviously strong reliance must be placed on the expertise of the regulating agency." (Emphasis added)

Commission found would defeat all higher rates and would thereby destroy the just and reasonable rate structure upon which all carriers must depend. Under the holding of the court below the Commission is powerless to regulate carrier rate structures as a whole and is thereby powerless to accomplish the goals of regulation embodied in the Act and set forth in the National Transportation Policy as recognized by this Court in *Ann Arbor R. Co.* v. *United States,* 821 U.S. 658 (1930), and *Baltimore & Ohio Railroad Co.* v. *United States,* 345 U.S. 146 (1953).

III

The third argument of the Motion to Affirm is that the court did not, as asserted by appellants, ignore a finding by the Commission that during a specific period the New Haven transported more than 4,000,000 pounds of *additional* traffic at the rates involved in return for only $129 of additional gross revenue. It is urged by appellees that the matter is of no great significance because it was not mentioned by the Commission in the portion of its report entitled "Discussion and Conclusions," and appellees further state that the fact is of no consequence because there was no way of determining the volume of traffic which would have moved in the absence of the rates and no indication of what the average weight of lading per car would have been.

A. As to appellees' first point, there can be no question that the Commission did make the finding (19a), and it went on to note that the additional $129 for transporting over 4,000,000 pounds of additional freight represented less than one-third of a cent in revenue for each additional 100 pounds of traffic moved (19a).

The fact that the finding was made in the portion of the Commission's report discussing the evidence and was not specifically referred to in the portion entitled "Discussion and Conclusions" does not invalidate the Commission's conclusion that the considered rates constitute a destructive competive practice. "* * * There is no requirement that the Commission specify the weight given to any item of evidence or fact, or disclose mental operations by which its decisions are reached. * * *"[11] All that the statute requires is a report which sufficiently discloses the basis of the Commission's judgment.[12] Most assuredly the Commission is not required to spell out the obvious, and it is painfully obvious that the transportation of 4,000,000 pounds of additional freight for virtually no increase in revenue must result in a significant decrease in net revenue. In this factual circumstance the rate proposal necessarily has an adverse effect upon the proponent thereof. It was upon this basis, coupled with the finding that the complete departure of the considered rates from classification principles will be destructive of just and reasonable rate structures, that the Commission concluded that the considered rates constitute a destructive competitive practice within the proscription of the National Transportation Policy.

B. As to appellees' second point, the record shows their contention to be in error. The Commission in its report reproduced a table introduced in evidence by the New Haven Railroad which showed the traffic moved under the proposed rates in comparison with

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[11] *Baltimore & O. R. Co.* v. *United States,* 298 U.S. 349, 359 (1936).

[12] *Alabama Great S. R. Co.* v. *United States,* 340 U.S. 216, 228 (1951).

the traffic which would have moved in the absence of the proposed rates (18a). That exhibit itself set forth the average weight per car and the average revenue both under the proposed rates and in their absence. Moreover, Division 2 of the Commission in its report on the proposed rates (313 I.C.C. 275) made specific note of the contention of the protestants that for every 30,000 pounds of traffic diverted from motor carriers by the proposed rates, 100,000 pounds is diverted from the New Haven's higher priced boxcar service. (313 I.C.C. at page 278). The evidence abundantly supports the Commission's conclusion and it made the findings necessary to a logical understanding of its conclusion.

In spite of the foregoing, appellees quote the comments of the court below that the court did not fully understand the basis of the Commission's conclusion that the proposal is a destructive competitive practice. They then assert that the court's reversal of the Commission "* * * is quite an ordinary conclusion which presents no substantial question for this Court."[13] It is worthy of note that the court treats the Commission's conclusion as having been reached under Section 15a(3) when in point of fact it was not. The court apparently is of the view that a finding of destructive competition can only be reached where Section 15a(3) is involved and then only under unique circumstances. It looks for support of its decision to *New York, New Haven & Hartford R. Co.* v. *United States*, 199 F. Supp. 635 (1961) which was vacated by this Court in *I.C.C.* v. *New York, N. H. & H. R. Co.*, 372 U.S. 744 (1963).

The court's error here is twofold. First, the National Transportation Policy specifies that all provi-

[13] Motion to Affirm, page 9.

sions of the Act shall be administered and enforced with a view to carrying out that policy. The rates in question do not present issues under Section 15a(3) for their primary genesis lay in an attempt by the New Haven to meet the trailer-on-flatcar competition of other railroads. The issues do clearly arise under Sections 1(5), 1(6), 2, and 3(1). If the Act is to be construed for the first time as not permitting a finding of destructive competition except in conjunction with the resolution of issues under Section 15a(3) the departure from the explicit provisions of the Act and the National Transportation Policy should be initiated by Congress.

The second error of the court on the question of destructive competition is that the considered rates clearly meet the court's own test in that they are hurtful to the proponents thereof as well as to competitors. In this regard, bearing in mind the Commission's factual findings and the implications which logically follow therefrom, the commission's statement of its conclusion is vastly more intelligible than is the obscure statement of the court below. The Commission's conclusion reads (22a):

> "The rates here under investigation, however, apply not only on mixed but also on straight shipments of numerous commodities which would otherwise be subject to higher rates. Thousands of commodities are included in this sweeping adjustment without relation to classification principles, and without regard to the destructive effect which the proposed rates would have upon just and reasonable rate structures necessary to the maintenance of an adequate national transportation system. If not restricted to reasonable mixtures, such rates could, and no doubt would, break down these rate structures to the detriment of car-

> riers and shippers alike. The evidence is clear that such result would follow approval of the proposed rates. In these circumstances, the rates must be condemned as constituting a destructive competive practice in contravention of the national transportation policy, and also as in violation of section 1(6) of the act."

There can be no question but that the court below has intruded upon the administrative jurisdiction of the Commission itself. It is the Commission's function to determine the transportation needs of the country and to so regulate the carrier members of the national transportation system in terms of both operations and rates as to meet those needs. In the performance of that task the Congress has established clear standards for the Commission to follow and it is beyond the authority of the court below to declare that one of those standards may be disregarded because a proposal does not appear to violate other standards. The basis for the court's declaration is that because the railroads are no longer a monopoly, economic circumstances are significantly different than when Section 1(6) was enacted. But this is immaterial for it was not the function of the court to pass upon the wisdom of the Commission's action, and neither the Commission nor the court is authorized to change the statute. Rather, it was the function of the court to test the Commission's action against the Congressional mandate.[14] It is a matter of the utmost importance when a court reverses the Commission because of its disagreement with the wisdom of the Commission's action, and it is of vastly greater importance when a

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[14] See, *American Trucking Assos.* v. *United States, I.C.C.*, 364 U.S. 1, 15 (1960).

court declares that the Commission may not find rates to be in violation of a section of the Act.

IV

The final argument of appellees in support of their motion is that the court below was obviously correct in holding that the railroads are "asserting whatever inherent advantages of cost and service they possessed" (13a). However, both appellees and the court below ignore the fact, recognized by the Commission and by the court at the outset of its opinion, that the competition which the New Haven set out to meet was the trailer-on-flatcar service of other railroads. The very railroads whose competition the New Haven sought to meet promptly published similar rates and are among the railroads now defending those rates although they did not submit evidence to the Commission to show that the rates were necessary to compete with other modes of transportation.

In this context, appellees also argue that no important issue is presented by the holding of the court below that competition justifies departure from the requirements of the Act. They point out that the court's holding does not prevent a carrier from charging higher rates when it can successfully do so to offset lower rates such as those which this Court found to be lawfully required in *Baltimore and Ohio Railroad Co.* v. *United States,* 345 U.S. 146 (1953). The important issue is not whether the decision of the court below leaves a carrier free to in some instances charge a higher rate nor was that the important issue in the *Baltimore and Ohio* case. There, this Court held that the Commission could require carriers to perform transportation at low rates so long as the rate structure as a whole produced

sufficient revenues to protect the financial integrity of the carriers. Here the issue squarely presented to this Court is whether or not the Interstate Commerce Commission has power to protect the just and reasonable rate structures of the carriers by condemning under Section 1(6) a rate proposal which would destroy those rate structures.

RESPONSE TO MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES

Subsequent to the filing of the Jurisdictional Statement the Interstate Commerce Commission and the United States, defendants in the court below, submitted a memorandum in which they stated that the Commission believes the lower court's interpretation of Section 1(6) and of the National Transportation Policy to be erroneous. They went on to state that the Commission entertained some doubt as to its own findings in relation to matters relied upon by the court and therefore reopened the proceedings before it for further consideration and hearing. They then state that both believed an appeal to this Court to be inappropriate under the circumstances.

Appellees comment upon the joint memorandum at page 5 of their Motion to Affirm and state that, "Reopening the case before the Commission will have no effect on the unlawful application of Section 1(6) by the Commission." They go on to suggest that the appellants are apparently satisfied with the state of the record before the Commission. We assume that this suggestion is predicated on the fact that the appellants are actively pursuing their appeal to this Court, and if our assumption is correct the suggestion is in error. The court below did not remand the case to the

Commission and its decision presents questions of law which are ripe for review by this Court.

Appellants are aggrieved by the holding of the court below that the Commission may not condemn the rates in issue under Section 1(6) of the Interstate Commerce Act. In view of the fact that the court below reversed the Commission on a question of law and did not remand the proceeding to the Commission for the making of further findings or for further proceedings of any kind, the doctrine of law of the case would seem to preclude the Commission from applying the standards of Section 1(6) to the rates in issue in any further proceedings. As this Court has held, the position of an administrative tribunal is much akin to that of a United States district court.[15] Thereby, when a decision of an administrative tribunal is reviewed by a court in an appellate capacity, the pronouncements of the reviewing court on questions of law become the law of the case in any further proceedings before the administrative tribunal, unless the decision of the reviewing court is declared erroneous by a tribunal of competent jurisdiction holding a superior position in the judicial pyramid. "* * * In such a situation it behooves the inferior arbitor to exercise great care that 'the law of the case' is applied to the facts of the case when they have been precisely determined by it. This is so even when it finds itself in well founded disagreement with its reviewer."[16]

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[15] *Federal C. C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

[16] *Morand Bros. Beverage Co.* v. *National Labor Rel. Bd.*, 204 F. 2d 529, 532 (1953), cert. den. 346 U.S. 909.

The court below, in reviewing the decision of the Interstate Commerce Commission and in setting aside that decision, stated "The issues of this case should never have been framed under Section 1(6) nor should the meaning of the National Transportation Policy, as referred to in Section 15a(3), have been distorted to supplement it." Appellants believe, for all of the reasons set forth in the Jurisdictional Statement, that the court below committed grievous legal error and that the decision of the Interstate Commerce Commission was proper and correct in all material respects. While, on the basis of a new record, the Commission is free to find that the rates in issue violate other sections of the Act, i.e., 1(5), (2), or 3(1), the application of the doctrine of law of the case forecloses a determination that the considered rates are in violation of Section 1(6). Appellants submit that there is a vital legal issue arising from the lower court's treatment and interpretation of Section 1(6) and that they are entitled to relief with respect thereto from this Court.

If this Court be of the opinion that the Commission in its reopened proceeding is or should be free to consider the lawfulness of the rates in issue under all sections of the Act and the National Transportation Policy and is therefore not inclined to give the case plenary consideration at this time, appellants respectfully ask that the decision of the court below be vacated and the case be remanded with instructions that the court below further remand the matter to the Commission for appropriate proceedings.

CONCLUSION

Appellants respectfully submit that the questions posed by the decision below are substantial and are of sufficient public importance to require plenary consideration by this Court, and, therefore appellants request that the Motion to Affirm be denied.

Respectfully submitted,

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March 17, 1964

Appendix A

APPELLANTS

All States Freight, Inc.
Chicago Express, Inc.
Eastern Express, Inc.
Long Transportation Company
W. L. Mead, Inc.
Ramus Trucking Lines, Inc.
Roadway Express, Inc.
Spector Freight System, Inc.
The Western Express Company
Wilson Freight Forwarding Company
The Eastern Central Motor Carriers Association, Inc.